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NO. 83-1791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LUELLA BREEN, et. al.,

Petitioners,

v.

INTERNATIONAL LADIES' GARMENT WORKERS UNION, et. al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE CENTER ON NATIONAL LABOR POLICY, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTEREST OF AMICUS

The Center on National Labor Policy, pursuant to Rule 36 of this Court's Rules, respectfully submits its brief *amicus curiae* in support of the petition of Luella Breen. Consent to

file this brief was sought and obtained from all the parties involved.

The Center on National Labor Policy is a national, nonprofit organization chartered as a public-interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the adverse impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers.

The Center urges this Court to grant the petition and to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit in *ILGWU v. Donovan,* 722 F.2d 795 (D.C. Cir. 1983).

Center attorneys have represented homeknitters in collateral litigation who, like petitioners, have been detrimentally affected by the court of appeals' decision. Furthermore, Center attorneys have represented workers engaged in various forms of other homework which, in the same manner as knitted outerwear, is also prohibited. Therefore, in attempting to secure the right of all homeworkers to carry on their livelihood, the Center can represent other vital interests in having the decision of the court below reversed by this Court.

Petitioner has primarily focused on important issues of standing and judicial review of agency decisionmaking. In addition to supplementing petitioners' arguments, the Center has separately discussed why recent events have not mooted this case. Therefore, the Center can assist this Court's full consideration of all the issues presented by the instant petition.

II. ISSUE PRESENTED

Whether the court of appeals erred in finding the Secretary of Labor's decision to rescind a forty year old regulation pro-

hibiting knitted outerwear homework violated the Administrative Procedure Act and the Fair Labor Standards Act and required the consideration of other alternative courses of action short of rescission of that regulation.

III. INTRODUCTION

Petitioners Luella Breen, Cecile Duffany, Linda Guetti, and Mary Hon are individuals who work in their homes knitting ski hats and sweaters. They are among approximately 1,000 of this country's 63,000 people employed in the knitted outerwear industry who perform their work at home rather than in a factory.

In 1980, petitioners became aware of a Labor Department regulation which prohibited homework in their knitted outerwear craft. *See* 29 C.F.R. Part 530. When it became apparent that the Department was going to enforce the regulation against them, petitioners sought representation to challenge the constitutionality of the regulation.

At approximately the same time, the Department announced its intention to reexamine the status of homework, and in January and February 1981, it held hearings to determine whether homework restrictions, which had been in effect for almost forty years, were still necessary. Following the hearings, in which the testimony raised doubts over the effectiveness of the homework restrictions' purpose of safeguarding the federal minimum wage, Secretary Donovan in May 1981, proposed to lift the homework restriction on knitted outerwear and those affecting six other crafts.

Citing the testimony and letters received during a comment period following the proposed rule which demonstrated that the restriction was causing economic hardship among the

homeknitting community, as well as evidence highlighting the futility of the homework prohibition as an effective measure of enforcing the minimum wage, the Department issued a final rule in October 1981 lifting only the knitted outerwear restriction. Because of the absence of testimony or evidence regarding similar problems in the other six restricted homework occupations, Secretary Donovan retained those prohibitions.

Respondent International Ladies' Garment Workers Union immediately brought an action in the United States District Court for the District of Columbia under the Administrative Procedure Act ("APA"), 5 U.S.C. § § 701 *et seq.* and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § § 201 *et seq.*, to overturn the Department's rule legalizing knitted homework.

The district court upheld the Labor Department's rescission of the homeknitting regulation. The court found that the overall record supported the Secretary's conclusion that minimum wage standards in homeknitting circles could be sustained without a blanket prohibition. The court noted that this finding was adequately premised upon such facts as the likelihood that homeworkers have been and would remain a relatively small percentage of the entire knitwear workforce and studies by the Department and Illinois Labor Department indicating that minimum wage violations in homeknitting were not so high as to justify its continued prohibition. There was also data which demonstrated that enforcement of the minimum wage was no more difficult or violations any more widespread in homeknitting than in the hundreds of other areas where homework is permitted. *See* Appendix at 93.

The primary reason which the court observed as supportive of the Department's removal of the homework ban was

evidence demonstrating that allowing homework in the knitting industry would prevent a substantial loss of employment opportunity. The court reminded respondents that the Secretary's duty to be attentive to the creation or curtailment of employment opportunities was just as compelling as his duty to prevent the circumvention or evasion of the minimum wage. Because there was concrete evidence supplied by petitioners and similarly situated homeknitters showing that a net gain in jobs could be realized by removing the restriction, coupled with only speculative evidence that the gain would be offset by a loss in factory employment, the court concluded that the Secretary properly exercised his discretion in balancing both considerations and deciding to lift the homeknitting restriction.

The court, in summarizing, found the testimony and other record evidence, the Secretary's expertise, and common sense supported his conclusion that effective enforcement was feasible without the homeknitting ban. The evidence to the contrary was only conclusory and the fact that there was no precise documentation on future enforceability was inevitable because of the longstanding illegality of homeknitting.[1] Consequently, the court rejected respondents' challenge to the removal of the prohibition.

Respondents appealed and on November 29, 1983, the United States Court of Appeals for the District of Columbia Circuit reversed the district court decision. *ILGWU v. Donovan,* 722 F.2d 795 (D.C. Cir. 1983). The court of

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[1]The court noted that the Secretary, by removing the restriction with simultaneous plans to closely supervise minimum wage enforcement in the homenitting industry, would provide that documentation. If the evidence eventually proved that enforcement was not feasible, the Secretary had promised to reinstate the restriction. *See* Appendix at 99 and 100.

appeals rejected as arbitrary and capricious the Department's conclusion that permitting knitted homework would not hamper enforcement of the minimum wage. It rejected as "unreasoned" virtually every premise articulated by the Secretary and accepted by the district court in support of his decision to remove the ban.

The court of appeals vacated the Secretary's rule lifting the homeknitting restriction and ordered the restriction to remain in effect unless modified through "reasoned decisionmaking." The court's mandate issued on February 28, 1984; as a result, petitioners, once again became trapped by immediate illegality in a livelihood they have sought to sustain for the past two years.

On March 27, 1984 the Department of Labor announced in the Federal Register a new proposed rule to lift the knitted outerwear homework restriction and provided for a comment period for interested parties to submit their view on the proposal. 49 *Fed. Reg.* 11786. Accompanying the proposal was an emergency rule that temporarily suspended the restriction on homeknitting while the rulemaking process was carried out. The effect of the emergency rule was to allow petitioners to resume work but only for a short period of time.

The emergency rule was to last only for 120 days, but respondents filed a motion in the district court contending that the emergency rule violated the mandate of the court of appeals. On May 8, 1984 the district court, after initially denying respondents request and a subsequent appeal to the court of appeals, ordered that the emergency rule be abolished. In their pleadings and arguments during these proceedings, respondents clearly implied that should a permanent rule lifting the restriction on homeknitting be reissued, they would reinstitute judicial action to overturn it. They have contended that the new evidence cited by the Secretary in the

Federal Register justifying the emergency and proposed rule is no different from that relied on by the Secretary in issuing his 1981 rule lifting the homeknitting restriction, and which the court of appeals found to be unreasoned, arbitrary, and capricious.

IV. REASONS FOR GRANTING THE PETITION

The court of appeals has held that before an agency can rescind a regulation which has been determined by that agency to be subversive to the purpose of a statute which Congress has entrusted it to enforce, the agency must positively prove to the satisfaction of the reviewing court that the premise upon which the regulation was initially promulgated *in fact* no longer exists. Furthermore, even if the agency were able to affirmatively establish that the regulation no longer achieved its intended purpose, the decision by the court below would require the agency to modify the regulation and adopt certain alternatives which *it* has deemed appropriate before complete rescission of the regulation would be sanctioned.

This unprecedented result violates explicit statutory limitations on judicial review set forth in the Administrative Procedure Act. In addition, the decision is at odds with prior rulings of this Court as well as the Fair Labor Standards Act pursuant to which the regulation at issue was promulgated.

The effect of the decision below is to require an agency to preserve a regulation in some form, despite evidence demonstrating that its impact may have grown to be harmful to more people than it benefits. Therefore, in view of the widespread consequences which the decision below has upon many individuals and the enduring controversy which the homework issue has generated, review by this Court is imperative.

A.

RESCISSION OF THE KNITTED OUTERWEAR HOMEWORK RESTRICTION WAS NOT ARBITRARY AND CAPRICIOUS BUT WAS EXPRESSLY AUTHORIZED BY THE FLSA AND IS CONSISTENT WITH DECISIONS OF THIS COURT INCLUDING THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION CASE

As the court of appeals recognized, the Department of Labor's decision to rescind the knitted outerwear homework restriction was the result of informal rulemaking conducted under §4(c) of the APA, which applies to this homework regulation pursuant to §11(d) of the Fair Labor Standards Act. The court agreed that the applicable standard of review is the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" test. *ILGWU v. Donovan,* 722 F.2d 795, 812 (D.C. Cir. 1983).

Familiar as this test is, its elements bear repeating. In the court of appeals' own words:

> review is focused and restricted and it does not permit us to substitute our judgement for that of the agency. "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " We must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement." (citations omitted).

ILGWU, 722 F.2d at 814.

The Secretary's rescission of the knitted outerwear homework regulation clearly was not arbitrary and capricious under the foregoing principles, and it therefore should have

been sustained by the court of appeals. The Secretary's explanation of reasons for rescission contained an adequate "consideration of the relevant factors"—factors Congress specified in the FLSA—and it reflects no "clear error in judgement." To the contrary, the rationale for the Secretary's decision was sensible and well-founded.

Following re-examination of the utility of the regulation restricting homework in the knitted outerwear industry, the Secretary was unable to find that in 1981 it was reasonably related to the purpose of the FLSA. The Secretary, in the final rule, set out the fundamental purpose of the FLSA which he described as "the need to safeguard the minimum wage where it is threatened by the existence of industrial homework [as well as] the need to eliminate . . . 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . *without curtailing employment or earning power.*'" *Appendix* at 172-173.

The Secretary explained that his inability to find the regulation and purpose of the Act reasonably related stemmed from "available evidence demonstrating that substantial curtailment of employment opportunities and earning power will result from continuation of the restrictions on industrial homework in the knitted outerwear industry." *Id.*, at 173. This evidence consisted of testimony and comments from approximately 100 homeknitters, an estimate by the Vermont Commissioner of Labor and Industry that 200 to 400 people were working as homeknitters in that state alone, and an estimate by a knitted outerwear employer that several times the number of Vermont homeknitters were employed nationwide. *Id.*, at 172.

The court of appeals recognized that "curtailment of employment" was a significant motivating factor behind the Secretary's decision. *ILGWU*, 722 F.2d at 826. However, it

devoted only two pages of a sixty-four page decision to this issue. In fact, curtailment of employment and earning power was the *prime* reason underlying the decision to re-examine the homeknitting regulation and ultimately to rescind it. Contrary to the court's conclusion, *Id.*, at 827, hard data did exist which confirmed the fact that the regulation was jeopardizing "existing illegal employment of homeworkers . . . [and] additional opportunities in homework." *Id.*, at 826. The Secretary therefore resolved that the FLSA would best be served by removing the restriction. This decision plainly reflected a "rational connection between the facts found and the choice made," *Id.*, at 814, and therefore was not arbitrary and capricious, without the need to even consider any other factors upon which the Secretary relied.

The court of appeals found this aspect of the Secretary's decision arbitrary and capricious because he didn't "adequately consider the *possibility* that this employment increase would be offset by economic injury to factory workers." *Id.*, at 827 (emphasis added). Petitioners have explained, however, that this "possibility" is not a "relevant factor" which required consideration. Pet. Brief at 55-63. Nevertheless, the Secretary did consider the comments raising this suggestion and in this final rule, specifically dismissed them because they weren't adequately substantiated.[2] *Appendix* at 172. The court acknowledged that the Secretary's response to these comments were accurate, *Id.*, at 827, yet proceeded to find that his failure to analyze them rendered his decision arbitrary and capricious.

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[2]Furthermore, the comments reflected the biased view of labor union officials and also the National Hand Embroidery & Novelty Mfrs. Ass'n which obviously could not have possessed authoritative information concerning circumstances within the knitted outerwear industry. *See ILGWU*, 722 F.2d at 827 nn. 72 & 73.

In light of the specific evidence that the homeknitting restriction was frustrating job opportunities in that industry contrasted to mere speculation that lifting the restriction might work injury to factory workers, there was no "clear error of judgement" regarding the Secretary's decision to rescind the restriction. For the court of appeals to have ruled the Secretary's action arbitrary and capricious for not considering these unfounded concerns demonstrates, instead, the unreasoned nature of its decision.

Despite the Secretary's reasoned consideration of the relevant factors after a reopening and de novo reexamination of the homeknitting regulation, the court of appeals' principle reason for invalidating the decision to rescind was the Secretary's failure to opt for certain identifiable alternatives before choosing complete rescission. *ILGWU,* 722 F.2d at 815. However, the FLSA does not require the Secretary to consider specific alternatives to outright rescission. Neither does the APA. The FLSA simply states, in relevant part, that the "Secretary is authorized to make such regulations and orders regulating, restricting or prohibiting industrial homework. . . ." 29 U.S.C. §211(d).

If there is a statutory limitation on the Department of Labor's power to totally rescind a regulation in favor of a more moderate alternative, it must be contained in either the FLSA or another statute. "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark v. Wickard,* 321 U.S. 288, 309(1944). Thus, the court's ruling that the Secretary was restricted in some way from exercising his discretion to rescind the homeknitting regulation must have some basis in *enacted* legislation; it must rest on a "firsthand judicial comparison of the claimed excessive action with the perti-

nent statutory authority." *Western Union Telegraph Co. v. FCC,* 541 F.2d 346, 354 (3d Cir. 1976).[3]

Since the FLSA contains no requirement that alternatives be considered before the Secretary reaches a decision to rescind a regulation, the court of appeals was wrong to read such a requirement into the statute. Its reliance on *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.,* 103 S.Ct. 2856 (1983), for the proposition that the Secretary was compelled to consider a less "drastic" decision to rescind the regulation is misplaced. That case involved a statute nearly identical to those found in *Overton Park, Vermont Yankee,* and *Scenic Hudson Preservation,* which mandated consideration of certain alternatives before rescinding a regulation. In fact, the Safety Act at issue in *Motor Vehicle Mfrs. Ass'n* essentially prohibited rescission of the regulation therein because no remaining passive restraint standard would have remained *at all* following removal of Standard 208. This result would have been in direct defiance of the Safety Act which was enacted to *direct* the Secretary of Transportation to issue motor vehicle safety regulations to reduce traffic

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[3]In certain instances Congress has intended that an agency consider alternative courses of action before reaching a particular decision, but has *expressly* so provided. *See e.g., Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 411 (1971) (highway statutes involved therein explicitly required the Secretary to consider whether there were "feasible and prudent alternatives" to locating a highway in parkland); *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 549-555 (1977) (NEPA explicitly requires that all federal agencies include in every report of major federal action significantly affecting the quality of the human environment "a detailed statement by the responsible official on . . . alternatives to the proposed action."); *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608, 614 and 617 (2d Cir. 1965) (Federal Power Act requires FPC to consider alternatives to licensing that might better protect recreational values).

injuries and deaths resulting from accidents.

The FLSA contains no comparable obligatory language requiring maintenance of the homework restrictions and under the APA there was nothing to prevent the Secretary from determining that the existing homeknitting regulation was inappropriate and should be rescinded. In fact, this "deregulation" creates the application of every other FLSA regulation, including record-keeping, minimum wage, and protection of the homeworker's right to sue.

The court of appeals should not have mandated a different procedure by insisting that "obvious" alternatives which it preferred be considered as a condition precedent to rescission. *Vermont Yankee Nuclear Power Corp. v. NRDC, supra.* The decision below casts the court in the role as a champion of existing regulations removing from the Secretary the regulatory decisionmaking power authorized him by the FLSA and APA. Such judicial intrusion into the administrative process is wholly unwarranted.

B.

PROMULGATION OF NEW NOTICE OF PROPOSED RULEMAKING TO RESCIND THE KNITTED OUTERWEAR RESTRICTION DOES NOT MOOT THIS CASE

Subsequent to the November decision of the court below, the Secretary issued a new proposed rule to lift the knitted outerwear homework regulation. 49 *Fed. Reg.* 11786 (March 27, 1984). On the same day, he issued an emergency temporary rule suspending the court imposed ban on homeknitting pending permanent rulemaking proceedings. 49 *Fed.*

Reg. 11792. This action by the Secretary, however, has not mooted the issues presented to this Court for review.

This Court has ruled that:

> a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome . . .; jurisdiction, properly acquired, may abate if the case becomes moot because:
>
> 1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and
>
> 2) . . . events have completely and irrevocably eradicated the effects of the alleged violation . . .
>
> When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Neither standard is met here.

There is absolutely no doubt that the issue of whether the Secretary violated the APA will recur; in fact, it already has. Within two days following the March 27, 1984 announcement of the proposed and emergency rule, the ILGWU returned to district court seeking a court order invalidating the emergency rule. The district court, after initially denying the relief, eventually granted the request following an appeal to the court of appeals which remanded the case back to the district court with instructions to strike the emergency rule. Throughout those proceedings, the ILGWU indicated that they have every intention of challenging the final rule removing the homeknitting regulation now being considered by the Secretary.

Furthermore, the proposed rule which the Secretary contemplates reissuing is essentially the same rule which the

court of appeals found arbitrary and capricious. Although the Secretary has sought to cure, in his new rule, what the court below believed was arbitrary and capricious in the initial rule, dictum from the recent district court opinion invalidating the emergency rule provides no assurance that it or the court of appeals will ever find the Secretary's cure satisfactory. Memorandum Opinion No. 81-2606 at 5 (D.D.C. May 8, 1984). See attached copy. It is this threat of review which eliminates any "assurance that there is no reasonable expectation" that the Secretary's final new rule will again be subjected to the same erroneous standard of review.[4]

In the projected future challenges to a final rule rescinding the knitted outerwear restriction, the respondents obviously intend to rely on the court of appeals' opinion as the benchmark to judge the legality of the Secretary's current rulemaking. Thus, rescission of the rule would not "completely and irrevocably eradicate the effects" of the court of appeals' decision.

As already shown, the recent emergency rule proceedings clearly illustrates the ILGWU's understanding of the court of appeals' decision as one of procedural and substantive significance. Their successful challenge of the rule was premised almost entirely on the court of appeals opinion. That opinion

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[4]Furthermore, if it were thought that the mere pendency of another rulemaking procedure leading to a substantially identical rule would be sufficient to remove an actual controversy, then important issues of administrative procedure would always elude review while agencies struggle repeatedly to meet APA standards, but which the court of appeals refuses to sustain. This Court has jurisdiction to deal with such situations. *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 516 (1911). *See also Moore v. Ogilvie,* 394 U.S. 814(1969) and *Nebraska Press Assn. v. Stuart,* 427 U.S. 539(1976) (situations capable of repetition yet evading review should not be dismissed as moot).

prompted the district court to further opine that any subsequent removal of the restriction again following notice, comment, and formation of a new regulation probably would not survive another challenge because of its belief that the new rule's justification will be based on evidence which the court of appeals rejected in its initial decision. Memorandum Opinion No. 81-2606 at 5(D.D.C. May 8, 1984). Although the district court is wrong regarding this point, it clearly illustrates the continuing effect the court of appeals decision will have on subsequent agency rulemaking.

This case remains a live controversy because the current rulemaking is being undertaken in light of the court of appeals' decision. The Department's rulemaking procedure has necessarily been influenced by the court. *See Carroll v. Princess Anne,* 393 U.S. 175, 178(1969) (where a lower court decision "continues to play a substantial role in the response of [government] officials," the Court's jurisdiction does not cease); *See also Mootness on Appeal in the Supreme Court,* 83 Harv. L. Rev. 1672, 1680(1970) (it may be said that the adverse effects give the challenger, who otherwise has nothing to gain, a sufficient interest in the litigation). The Department has accordingly adopted a more sweeping analysis of its decision to rescind the knitted outerwear regulation although petitioners have steadfastly maintained that the initial rule was not arbitrary and capricious. Promulgation of the new rule is as legitimate an exercise of authority as the rule in issue here. If petitioners are correct in their assertion before this Court, the Secretary's new rule will not be as open to future challenge and his initial rule will be sustained. No resolution of either issue has been settled by the recent pronouncement of new rulemaking.

In these circumstances therefore, it is quite unlikely that "the issues presented are no longer 'live' or the parties lack a

legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496(1969). Rather, the controversy in this case remains "definite and concrete touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 240-41(1937).

V.

CONCLUSION

For the reasons stated above, *amicus curiae* Center on National Labor Policy submits that this Court should grant certorari to review the decision below.

Respectfully submitted,

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May 31, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL LADIES' GARMENT WORKERS UNION, *et al.*, Plaintiffs, v. RAYMOND J. DONOVAN, *et al.*, Defendants.	Civil Action No. 81-2606

MEMORANDUM

The Court of Appeals has remanded "forthwith" plaintiffs' Motion to Compel Compliance. The remand order directed this Court, "if appropriate under the facts and circumstances of this case, [to] enforce [the] Court [of Appeals'] mandate and require appellee Secretary to comply with its terms." Order, *International Ladies' Garment Workers Union v. Donovan,* No. 82-2133 (D.C. Cir. Apr. 30, 1984). The opinion explaining the order stated that this Court is to "determine whether the 'emergency' rule promulgated by the Secretary violates the terms of our [Court of Appeals'] previous mandate." *Id.,* slip op. at 4. That mandate had declared that:

> The restriction against industrial homework shall be reinstated and remain in effect unless properly modified pursuant to 'reasoned decisionmaking' consistent with the opinion of this Court [of Appeals].

722 F.2d at 828.

The Court of Appeals' opinion of April 30 noted that this Court had previously determined that plaintiffs would prob-

ably prevail on their claim that, "in the circumstances here notice and opportunity for comment are essential for the kind of 'reasoned decisionmaking' contemplated by the Court of Appeals." Memorandum Opinion at 3 (D.D.C. Apr. 11, 1984). The Court of Appeals expressed the view that "[a]bsent facts that do not appear in the record before us, we are of the view that the District Court's tentative conclusion concerning the merits of the appellant's position is clearly correct." Slip op. at 5 (Apr. 30, 1984). The remand opinion concluded that:

> If, on remand, it remains clear to the District Court that the Secretary has violated the express terms of our mandate, the [district] court must act forthwith to enforce the mandate and require the Secretary to comply with its terms.

Id. at 5.

Immediately upon receiving the forthwith remand order, this Court scheduled a hearing for May 4, 1984. In advance of that hearing, the Court invited defendants to identify and prove any facts that were not previously in the record before the Court of Appeals that would obviate the necessity for notice and comment. Defendants have neither identified nor proven any such facts. Indeed, counsel for the defendant Secretary stated at the May 4 hearing that:

> we do not have any further evidence to proffer because we believe that the evidence shown in the preamble to the proposed rulemaking and to the emergency suspension set forth facts justifying the Secretary's action.

All of the evidence in the preamble was before the Court of Appeals when it rendered its April 30 decision.

It is the law of this case that notice and comment are requisite to "reasoned decisionmaking." There was plainly no notice and comment prior to the issuance of the "emergency"

rule. Furthermore, even if there had been notice and comment, the reasons stated by the Secretary for his failure to follow the Court of Appeals mandate have been rejected by that Court as inadequate. As the Court of Appeals' remand opinion declared with respect to justifying the "emergency" rule:

> The alleged justification advanced by the Secretary in defending his action is merely a repeat of the argument he advanced in his motion to stay this panel's decision—an argument that has already been rejected by the [C]ourt [of Appeals].

Slip. op. at 5.

The Court of Appeals' remand order contemplates an initial determination by this Court not only as to whether the emergency rule violates the mandate, but also as to whether enforcement of the mandate is "appropriate under the facts and circumstances of this case." Turning to the second issue framed by the Court of Appeals—the appropriateness of enforcing the violated mandate—the remand opinion by its terms precludes further consideration of the question plaintiffs declined to address: whether the "emergency" rule threatens them with irreparable injury. It is also apparent that the "emergency" rule is in effect, if not in form, an administrative stay of the Court of Appeals' mandate. Defendants argue that the emergency rule will only be in effect for a few weeks, and that at the end of that time a fresh, valid rule with the benefit of notice, comment, and reasoned decisionmaking will be in place. Therefore, the argument runs, it would not be appropriate to uproot homeworkers for that brief period. But, as indicated, the rationale for the "emergency" rule is not materially different from arguments the Secretary and other defendants have unsuccessfully advanced to the Court of Appeals in support of an earlier application for stay of the

mandate at issue here.[1] That previous application was based in part on the hardship which the Court of Appeals' mandate would cause to homeworkers who are so engaged in reliance on the regulations which the Court of Appeals has held to be invalid. Thus, in determining whether forthwith enforcement is appropriate, this Court should not consider whether the "emergency" rule threatens plaintiffs with irreparable injury and should give little, if any, weight to hardship threatened to homeworkers by the Court of Appeals' mandate.

As already stated, the defendant Secretary, by his counsel, has, in effect, conceded that the only reason or evidence he now has for justifying the continuation of homeworking, pending notice, comment, and formation of a new regulation, are those stated in the preamble to the "emergency" rule. Yet, the Court of Appeals has already rejected this evidence and these reasons, some of them, at least twice. It is therefore most unlikely that fresh comments and renewed decision-making will produce evidence and reasons reconciling the broad exemption for homeworking which the Secretary has espoused with effective law enforcement that are materially different from, or more persuasive than, those which the Court of Appeals has so forcefully rejected. Thus, the pendency of new rulemaking is not any assurance that in 120 days, or in some other finite period, there will be a new and valid exemption permitting homeworkers to resume the activities proscribed by the Court of Appeals' mandate.

The Secretary attempts to justify the issuance of an "emergency" rule without notice or comment by invoking the "good cause" exception to the notice and comment requirement

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[1] A defendant-intervenor unsuccessfully applied to the Chief Justice for a similar stay, presumably on the same grounds. An intervenor has since filed a petition for writ of certiorari.

under the Administrative Procedure Act, 5 U.S.C. §553(b)(B). The Secretary claims that his action meets the criteria of the good cause exception. The emergency rule was promulgated in response to a "critical situation" in which the lives and livelihood of homeworkers would be disrupted if the ban on homeworking were not suspended. In addition, the emergency rule will expire after only 120 days and was adopted simultaneously with the initiation of formal rulemaking for a final rule.

The Secretary has not met the stringent standard of review applied by this Circuit to claims of "good cause." Such exceptions "will be narrowly construed and only reluctantly countenanced." *National Federation of Federal Employees v. Devine,* 671 F.2d 607, 610 (D.C. Cir. 1982). Use of the exception is limited to emergency situations, and the courts are instructed to "closely examine" the agency's proffered rationale. *Id.* In *Devine,* an emergency was found where the agency was required to act "by events and circumstances beyond its control, which were not foreseen in time to comply with notice and comment procedures." *Id.* at 611. Here, the Secretary is faced not with unforeseen circumstances but with a decision by the Court of Appeals that his earlier action was an "abdication of his statutory responsibility." 722 F.2d at 828. Moreover, as already stated, the 120 days predicted for the term of the "emergency" rule is probably a gross underestimate of the time the "emergency" rule would have to stay in effect in order to "preserve the *status quo*" while any new rule is being perfected and reviewed. Furthermore, the "emergency" rule adopted by the Secretary was not modified in any way to conform with the Court of Appeals' decision striking down the original rule; instead, it merely reinstates that rule. *Compare American Federation of Government Employees v. Block,* 655 F.2d 1153 (D.C. Cir. 1981).

While the defendant Secretary may not be blatantly disregarding the Court of Appeals' mandate, he has failed to state the kind of acceptable good cause for delaying enforcement or to show that responsiveness to the Court of Appeals November 1983 opinion and mandate which might justify an "emergency" rule.

After considering all of the relevant "circumstances of this case," the Court concludes that the "emergency" rule violates the express terms of the Court of Appeals' mandate and that it is appropriate to vacate the "emergency" rule and to enforce the mandate of the Court of Appeals. Accordingly, the accompanying Order grants the plaintiffs' motion, and the relief they seek.[2]

Date: May 8, 1984 /s/Louis F. Oberdorfer
United States District Judge

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[2]Although the Court of Appeals' remand order was "forthwith," and the opinion states that this Court "must act forthwith," it would be imprudent in the circumstances not to give defendants a week of grace in which to apply to the Court of Appeals for a stay.

Also the accompanying order makes no provision for a bond. At the May 4 hearing, the Court, *sua sponte,* invited defendants to suggest a bond. The defendant Secretary stated that the government is not entitled to the protection of a bond. The other defendants failed to address the question.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL LADIES' GARMENT WORKERS UNION, *et al.*, Plaintiffs, v. RAYMOND J. DONOVAN, *et al.*, Defendants.	Civil Action No. 81-2606

ORDER

For reasons more fully stated in an accompanying Memorandum, it is this 8th day of May, 1984, hereby

ORDERED and ADJUDGED: that plaintiffs' Motion to Compel Compliance with this Court's Order of March 13, 1984, and the Court of Appeals' Mandate of November 29, 1983, is GRANTED; and it is further

DECLARED and ADJUDGED: that the Emergency rule issued by defendant Donovan on March 27, 1984, 49 Fed. Reg. 11792, is without good cause and invalid; and it is further

ORDERED: that the defendant Secretary shall forthwith rescind the emergency rule published at 49 Fed. Reg. 11792; and it is further

ORDERED: that 29 C.F.R. §§530.1(f) and 530.2, which together restrict industrial homework in the knitted outerwear industry, be continued in full force and effect, unless and until modified as a result of reasoned deciionmaking, after notice and comment, as prescribed by the Court of

Appeals' mandate of November 29, 1983; and it is further

ORDERED: that enforcement of this Order is STAYED until 4:00 p.m., May 15, 1984, unless otherwise ordered by the Court of Appeals.

Date: May 8, 1984 /s/Louis F. Oberdorfer
United States District Judge